

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

TRAVELERS CASUALTY AND  
SURETY COMPANY OF AMERICA,

2:13-CV-1121 JCM (CWH)

**Plaintiff(s),**

V.

PENGILLY ROBBINS SLATER LAW  
FIRM, et al.,

Defendant(s).

## ORDER

Presently before the court is defendants' motion to dismiss. (Doc. # 14). Plaintiff has filed a response (doc. # 18) and defendants have filed a reply (doc. # 21).

## I. Background

20 This matter arises in connection with a \$120,000 retainer paid by non-party Peek  
21 Construction Company (“Peek”) to the defendant law firm, Pengilly, Robbins, Slater (“PRS”).  
22 Plaintiff Travelers Casualty and Surety Company of America (“Travelers”) alleges that PRS colluded  
23 with Peek in order to illegally deprive Travelers of its alleged security interest in the \$120,000.

24 On or about November 27, 2006, Travelers executed a general indemnity agreement with  
25 non-party Williams Brothers, Inc. (“Williams”). On or about April 15, 2009, Travelers executed  
26 another general indemnity agreement with non-party El Camino Construction Company. On or  
27 about March 29, 2010, Peek became the successor to El Camino and agreed to be bound by the April

1 15, 2009, indemnity agreement.

2       Those agreements provided that, in the event of default, Peek and Williams conveyed all  
3 rights, title, and interest in property used as collateral to Travelers. "Property" was defined to  
4 include all current and after-acquired sums due then or thereafter, and all equipment, tools, materials,  
5 supplies, inventory, and vehicles. Travelers alleges it perfected this interest on or about September  
6 26, 2011, when it filed a UCC-1 financing statement with the Nevada Secretary of State.

7       Sometime in 2011, Peek and Williams allegedly defaulted under the terms of the indemnity  
8 agreement. Peek thereafter began liquidating the alleged collateral construction equipment through  
9 sales to various third parties.

10      Travelers initiated suit regarding the alleged breach of indemnity agreement in a separate case  
11 in this district, *Travelers Casualty and Surety Company of America v. Peek Construction Company,*  
12 *et al.*, 2:12-cv-00058-LDG-NJK. In that case, Peek retained PRS as counsel and issued a check in  
13 the amount of \$120,000 as a retainer. That litigation is currently ongoing. Travelers alleges in the  
14 instant suit that the retainer was issued using proceeds obtained from liquidating the collateral.  
15 Travelers further alleges that Peek had no right to liquidate said collateral, that PRS was aware that  
16 Peek was liquidating equipment subject to Travelers' security interest, and that PRS was aware  
17 Travelers had the right to the proceeds from the sale of said equipment. Travelers alleges Peek and  
18 Williams carried out these sales based on the advice of PRS and, in particular, defendant James  
19 Pengilly, Esq.

20      Based on these allegations, Travelers contends it is entitled to the \$120,000 payment. In  
21 response, PRS asserts that it simply gave legal advice to Peek instructing it that Travelers' interest  
22 was not perfected and Peek was within its rights to liquidate the equipment.

23      The amended complaint contains causes of action for (1) conversion; (2) fraudulent transfer;  
24 (3) tortious impairment of security interest; (4) tortious interference with contract; (5) claim and  
25 delivery; (6) aiding and abetting; (7) unjust enrichment; and (8) constructive trust. The defendant  
26 has filed the instant motion seeking to dismiss all causes of action for failure to state a claim.

27 ...

28

1     **II. Legal Standard**

2         A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can  
 3         be granted." FED. R. CIV. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain  
 4         statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2); *Bell*  
 5         *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual  
 6         allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements  
 7         of a cause of action." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted). "Factual  
 8         allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus,  
 9         to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim  
 10         to relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

11             In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when  
 12         considering motions to dismiss. First, the court must accept as true all well-pled factual allegations  
 13         in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950.  
 14         Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not  
 15         suffice. *Id.* at 1949. Second, the court must consider whether the factual allegations in the complaint  
 16         allege a plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff's  
 17         complaint alleges facts that allows the court to draw a reasonable inference that the defendant is  
 18         liable for the alleged misconduct. *Id.* at 1949.

19             Where the complaint does not permit the court to infer more than the mere possibility of  
 20         misconduct, the complaint has "alleged – but not shown – that the pleader is entitled to relief." *Id.*  
 21         (internal quotations omitted). When the allegations in a complaint have not crossed the line from  
 22         conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

23     **III. Discussion**

24             "A transferee of funds from a deposit account takes the funds free of a security interest in the  
 25         deposit account unless the transferee acts in collusion with the debtor in violating the rights of the  
 26         secured party." NRS 104.9332(2). Each of Traveler's claims are predicated on an alleged security  
 27         interest in the \$120,000. Thus, it must be demonstrated that PRS colluded with Peek in an effort to  
 28

1 deprive Travelers' of its rights to those funds. Otherwise each claim fails. In order to prove  
 2 collusion, Travelers would necessarily need to discover the content of certain communications  
 3 between Peek and PRS.

4       “Nevada recognizes the long-standing common law rule that communications uttered or  
 5 published in the course of judicial proceedings are absolutely privileged.” *Fink v. Oshins*, 49 P.3d  
 6 640, 643 (Nev. 2002). “The policy behind the absolute privilege, as it applies to attorneys  
 7 participating in judicial proceedings, is to grant them ‘as officers of the court the utmost freedom in  
 8 their efforts to obtain justice for their clients.’” *Id.* at 433 (*quoting Bull v. McCuskey*, 615 P.2d 967,  
 9 961 (Nev. 1980), *abrogated on other grounds by Ace Truck v. Kahn*, 746 P.2d 132 (Nev. 1987)).  
 10 “[I]t is in the public interest that attorneys speak freely with their clients, even if attorneys  
 11 occasionally abuse the privilege.” *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 583  
 12 F.3d 1232, 1236 (9th Cir. 2009). “An absolute privilege is an immunity, which protects against even  
 13 the threat that a court or jury will inquire into a communication.” *Hampe v. Foote*, 47 P.3d 438, 440  
 14 (Nev. 2002).

15       “Nevada has applied the absolute privilege related to judicial proceedings primarily in  
 16 defamation actions, but has extended its application to other causes of action which derivatively  
 17 depend upon the alleged defamation.” *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*,  
 18 440 F.Supp.2d 1184, 1195 (D. Nev. July 20, 2006) (*citing Fink*, 49 P.3d at 643 (defamation); *Knox*  
 19 *v. Dick*, 99 Nev. 514, 665 P.2d 267 (1983) (defamation and intentional infliction of emotional  
 20 distress); *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 984 P.2d 164  
 21 (1999) (civil conspiracy, interference with contract, and interference with prospective economic  
 22 damage which were derivative of defamation claim)).

23       The Nevada Supreme Court has applied the privilege to communications even if they were  
 24 known to be false or made with malicious intent. *Clark County Sch. Dist. v. Virtual Educ.*, 213 P.3d  
 25 496, 502 (Nev. 2009).

26       Relying on Nevada’s state court decisions, Nevada’s federal courts have expanded the  
 27 privilege to cover intentional torts that are not derivative of a defamation claim. *See, e.g., Crockett*,

28

1 440 F.Supp.2d 1184. The Ninth Circuit has affirmed this approach. *See, e.g., Crockett*, 583 F.3d  
 2 1232 (affirming district court's application of absolute privilege to bar claims for breach of implied  
 3 covenant of good faith and fair dealing and breach of fiduciary duties).

4       The Nevada Supreme Court has more recently applied the privilege to bar claims against a  
 5 law firm for abuse of process, slander of title, and intentional interference with prospective  
 6 advantage. *Bullivant, Houser, Bailey PC v. Eighth Judicial District Court of Nevada, et al.*, 2012  
 7 WL 1117467 (Nev. March 30, 2012). That court rejected the argument that the privilege was limited  
 8 only to communications giving rise to defamation claims. Instead, it applied the privilege to  
 9 encompass not only *communications* relating to those intentional torts not sounding in defamation,  
 10 but also to *conduct* based on those communications. *Id.* at \*3 (applying privilege to advice by  
 11 attorney as well as attorney's act of filing lawsuit and recording numerous *lis pendens*, allegedly filed  
 12 for improper purposes). Although an unpublished decision, *Bullivant* further illustrates the Nevada  
 13 Supreme Court's expansive application of Nevada's absolute litigation privilege to protect attorneys  
 14 advising their clients in the course of ongoing litigation from an increasing variety of intentional  
 15 torts.

16       Although it does not appear the Nevada Supreme Court has decided an identical scenario,  
 17 it has instructed that "courts should apply the absolute privilege liberally, resolving any doubt in  
 18 favor of its relevancy or pertinency." *Fink*, 49 P.3d at 644 (Nev. 2002); *see also Virtual Educ.*, 213  
 19 P.3d at 502 (when "determining whether the privilege applies [we] resolve any doubt in favor of a  
 20 broad application.").

21       The majority of PRS's alleged wrongdoing consists of communications and/or conduct by  
 22 PRS in its capacity as legal counsel for Peek. Because these communications were made during the  
 23 course of litigation, they are absolutely privileged. *Crockett & Myers, Ltd.*, 583 F.3d at 1236. As  
 24 a matter of law, they therefore cannot constitute the basis of Travelers' claims against PRS. *See*  
 25 *Bullivant*, 2012 WL 1117467 at \*3.

26 ...

27 ...

28

#### IV. Conclusion

In light of the principles underlying Nevada's absolute litigation privilege and the cases interpreting and applying that privilege, the court finds it applies to bar the instant claims. Defendants' motion to dismiss is granted.

5 || Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' motion to dismiss (doc. # 14) be, and the same hereby is, GRANTED. The clerk shall enter judgment accordingly and close the case.

9 || DATED March 25, 2014.

Xem C. Mahan  
**UNITED STATES DISTRICT JUDGE**